IN THE

Supreme Court of the United States

October Term, 1945

No. 1007-1008

In Bankruptcy

MICHAEL P. JORDAN,
Petitioner,

vs.

FEDERAL FARM MORTGAGE CORPORATION,
Et Al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

M. L. Donovan,
Omaha National Bank Bldg.,
Omaha, Nebraska,

G. P. North,
Karbach Block,
Omaha, Nebraska,

R. Brown,
Creston, Iowa,
Counsel for Petitioner.

Law Brief—OMAHA LINO-SLUG PRINTING CO—318 So. 18th St.

INDEX

TABLE OF CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

—o—o—

October Term, 1945

No.————

In Bankruptcy

—o—o—

MICHAEL P. JORDAN, *Petitioner,*

vs.

FEDERAL FARM MORTGAGE CORPORATION, FEDERAL LAND BANK OF OMAHA, STOCK YARDS NATIONAL BANK, SOUTH OMAHA; UNION CENTRAL LIFE INSURANCE COMPANY, A. L. JOHNSON, B. J. BERGESEN, THOMAS McCANN, JOHN DRAYTON, *Respondents.*

—o—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—o—

To the Honorable Harlan F. Stone, Chief Justice, and to the Associate Justices, of the Supreme Court of the United States:

Your Petitioner, Michael P. Jordan, respectfully petitions this Honorable Court for a Writ of Certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered in the above entitled cause on December 27, 1945, which

decision affirms the judgment of the United States District Court for the Southern District of Iowa, Southern Division, and holds that Petitioner is not a farmer within the definition of Section 75r of the Bankruptcy Act.

CIRCUIT COURT'S OPINION

The opinion of the Circuit Court of Appeals has been reported in Vol. 152, Fed. (2d), page 642, and is printed herein in the Transcript together with the opinion of said District Court.

RESPONDENTS

The interest of the various respondents named above are each that of secured creditors and are set out in the Debtor's Petition filed by Petitioner in the District Court asking relief under Section 75 of the Bankruptcy Act (Tr. 1, 2, 3, 4).

SUMMARY STATEMENT OF MATTERS INVOLVED

This cause involves the proper construction of Section 75r of the Bankruptcy Act, 11 U. S. C. A., Section 203r, and whether or not appellant is a farmer within the definition of said section and the facts appearing in the record herein.

Two Appeals, First Appeal

The decision of the Circuit Court involves two appeals from said District Court.

The records in the first appeal show that Petitioner, about 67 years of age, was born and reared in Cherry County, Nebraska, and upon attaining his majority began the purchase of lands and in time acquired a ranch of about 10,000 acres (Tr. 4), and became the owner of some 1,200 head of cattle thereon. During the years of drought,

1934, 1935 and 1936, through the purchase of feed, he became indebted, mortgaged his cattle and, upon default, all of same were sold, his ranch mortgaged and, upon default in payment of interest, 12 per cent, foreclosure begun thereupon. Petitioner, on about August 13, 1942, filed in the District Court of the United States for the District of Nebraska a Debtor's Petition under Section 75 of the Bankruptcy Act, wherein said District Court found he was not a farmer and dismissed his petition which, on appeal to the Circuit Court, Eighth Circuit, was affirmed (opinion reported in Vol. 139, Fed. (2d), 203, the Court holding therein that because of his leasing his ranch he was no longer a farmer, although he was such prior thereto. Subsequent thereto he purchased three farms in Iowa (Tr. 2, 3, 4), and subsequently on March 20, 1945, again filed his Debtor's Petition under said Section 75 in the District Court, Southern District of Iowa, which was approved and referred to George C. Figgins, Conciliation Commissioner. Upon hearing of motions of all creditors to dismiss, alleging said Petitioner not to be a farmer, the Commissioner denied said motions, adjudged and decreed Petitioner to be a farmer and denied dismissal (Tr. 20, 21, 22). Amended Debtor's Petition was filed May 4, 1945 (Tr. 22).

Petition for review was filed by all creditors, hearing had thereon in said District Court on April 26, 1945, and ruling entered that Petitioner was not a farmer and proceedings dismissed—"dismissed for lack of jurisdiction." The ruling was made on the assumption and holding that no change had occurred in Petitioner's status since the former decision of the Circuit Court and he was, therefore, not a farmer (ruling in Tr. 24).

Petitioner perfected his appeal to Circuit Court; hearing had and on December 27, 1945, opinion filed, affirmed,

judgment and decree of District Court (Vol. 152, Fed. (2d) 642, and set out in Transcript, pp.—).

The opinion cites as authority *Mulligan vs. Federal Land Bank,* Vol. 129, Fed. (2d), 436, and the opinion in former case of Petitioner stating that, one "although once a farmer abandons that vocation and leases his farm to another is not a farmer." No reference is made to the undisputed record that Petitioner was forced to rent his ranch to avoid loss of title by Sheriff's Sale and that all money received was paid into Court, judgment satisfied and sale and loss of ranch avoided (Tr. 13).

Second Appeal

After perfecting his appeal to the Circuit Court from ruling of District Court of May 4, 1945 (first appeal, supra), Petitioner filed in said District Court his Petition for Rehearing and for proceedings under Chapter XII of the Bankruptcy Act, alleging:

First. That no adjudication was made other than that Petitioner was not a farmer.

Second. Wholly failed to consider or adjudicate Petioner's right to proceedings other than under said Section 75.

Third. Committed error in dismissing Petitioner's proceedings in lieu of ordering his estate otherwise administered under Bankruptcy Act. Petitioned the Court that the dismissal be set aside, other issues adjudicated and estate be administered under Chapter XII of the Bankruptcy Act.

On hearing, ruling was entered October 8, 1945, that said Petitions were filed too late, that cause was dismissed

and Court was without jurisdiction as the cause was no longer pending in said Court. Petition dismissed and appeal perfected to Circuit Court. On motion, the two appeals were merged and submitted as one and the record in the second appeal was submitted on typewritten transcript. In the opinion of the Circuit Court filed December 27, 1945, it is ordered that the Petitions for a new trial and for proceedings under Chapter XII were filed too late, being filed after appeal had been taken from the former ruling and that the District Court was without jurisdiction to hear same. Judgment of District Court was affirmed.

JURISDICTION

The jurisdiction of this Court is sought to be invoked under the provisions of Section 347 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347), said decision being contrary to law and in conflict with the decisions of this Court and of other Circuit Courts and in conflict with prior opinions of its own.

STATUTE INVOLVED

"For the purpose of this section and section 22 (b) the term 'farmer' includes, not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer, and a farmer shall be deemed a resident of any county in which such operations occur."

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I.

The decision that the Petitioner was not a farmer is in conflict with several decisions of this Court and with several of its own decisions and is in direct conflict with the plain and positive definition of a farmer in said Section 75r and the facts shown in the record in this case.

II.

It is contrary to law and in conflict with all authoritative decisions in holding that an enforced leasing of the real estate and an enforced abandonment of farming operations effects a change of vocation. The record here shows, without dispute, that Petitioner's ranch was being offered at Sheriff's Sale and only by an immediate lease was he able to secure the funds, make payment of the judgment, avoid a Sheriff's Sale and the loss of title to his ranch, the record showing that all of said rental so received was paid into Court, whereby said judgment or judgments were satisfied. (See Tr. 12-13.)

III.

Committed error in holding that the former decision of said Circuit Court, that Petitioner was not a farmer, was in substance res adjudicata, the proceedings here being an entirely new proceedings on a new record showing the acquirement of a large amount of additional land (Tr. 4), showing subsequent thereto he had devoted his entire time to work on the ranch or in an attempt to refinance it, built new fences, set out 1,000 trees, purchased paint, repaired buildings, fences and other improvements (Tr. 12), paid insurance (Tr. 11), purchased five windmills (Tr. 13), paid taxes (Tr. 10), whereby there was a new

and different record before the Court, nor was the Court bound to reaffirm a prior erroneous decision.

IV.

Committed error in denying jurisdiction to hear the Petition for a Rehearing, wherein the Court was asked to adjudicate various issues not previousy adjudicated, including the right of Petitioner to have his estate administered on in bankruptcy, otherwise and under Section 75, and committed error in refusing to entertain or consider a direct or positive petition for administration under Chapter XII. None of said issues were in any way considered or adjudicated in the original opinion and as Courts in Bankruptcy have no terms and have jurisdiction to grant rehearings, set aside former rulings and orders so long as the bankruptcy proceedings remain pending.

Wherefore, your Petitioner prays that a Writ of Certiorari issue under the Seal of this Court directed to the United States Circuit Court of Appeals, Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the above entitled cause, being Numbers 13,117 and 13,194 on its docket, to the end that this cause may be reviewed and determined by this Honorable Court, as provided for by Section 347, Title 28, U. S. C. A.; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court; and for such further relief as this Court may deem proper.

MICHAEL P. JORDAN,
Petitioner.

By R. BROWN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

—o—o—

October Term, 1945

No.————

In Bankruptcy

—o—o—

MICHAEL P. JORDAN, *Petitioner,*

vs.

FEDERAL FARM MORTGAGE CORPORATION, FEDERAL LAND BANK OF OMAHA, STOCK YARDS NATIONAL BANK, SOUTH OMAHA; UNION CENTRAL LIFE INSURANCE COMPANY, A. L. JOHNSON, B. J. BERGESEN, THOMAS McCANN, JOHN DRAYTON, *Respondents.*

—o—o—

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—o—

OPINIONS BELOW

The two important and controlling issues involved in this case are, first, was Petitioner a farmer, and, second, if not should his estate have been administered under Chapter XII of the Bankruptcy Act as he petitioned or otherwise under said Act as provided for therein. The

Commissioner denied petitions to dismiss and held he was a farmer. The District Court on petitions for review reversed the Commissioner, held he was not a farmer and dismissed all proceedings, and the Circuit Court, on appeal, affirmed said decision.

SPECIFICATIONS OF ERRORS

I.

The Circuit Court erred in holding that under the facts in the record the Petitioner, Michael P. Jordan, was not a farmer within the definition of Section 75r.

II.

Committed error in dismissing all proceedings, as Petioner was entitled to have his estate administered in Bankruptcy even though not a farmer, and not entitled to administration under Section 75 and especially so since his status under Section 75n and under his Amended Petition under Section 75s was that of an adjudicated bankrupt, and he having filed petition for administration under Chapter XII, if denied administration under Section 75.

ARGUMENT

Section 75r in the most accurate, plain and definite language defines a farmer. In *First National Bank and Trust Company vs. Beach*, 301 U. S. 435, 57 Sup. Ct. Rep. 801, this Court, in the clearest and most concise language, stated what facts brought a debtor within the definition, stating there are two branches to the definition "are not equivalent. They were used by way of contrast. Occasions must have been in view when the receipts of income derived from farming operations would make a farmer out of someone who personally and primarily engaged in

different activities." "The totality of the facts is to be considered and appraised." The farming activities of Beach were nominal as compared with Petitioner here; his rentals were the controlling factor as are the rentals here. "The results will be the same, however, though the farming and leasing be viewed as disconnected and not as parts of composite whole. In that view the farming is still the business; the leases are then investments more profitable than the business but leaving it unchanged." A debtor remains the more a farmer if his leasing is enforced by Court and under necessity of avoiding loss of title. If the above by this Court is to be accepted then to hold Petitioner here not a farmer is a flagrant refusal to submit to the decisions of this Court. This Circuit Court, in its own decision in *McLean vs. Federal Land Bank*, 130 Fed. (2d) 123, where the record shows that debtor lost all title to his real estate, was employed some three years by others as a farm laborer, subsequently reacquired title, was personally liable in the foreclosure of a mortgage previously negotiated by him, was held to be a farmer. Here Petitioner asserts he has never lost title to his ranch, has at all times devoted all his time to the care, preservation and refinancing of the same, has retained all his farming equipment, is personally liable on mortgages pending in the foreclosure by the same bank (Sup. Tr. 2). He has applied all rentals on indebtedness against his ranch yet this same Court says he is not a farmer. The case of *Mulligan vs. Federal Land Bank*, 129 Fed. (2d) 438, cited as authority for its ruling has no possible application. The Mulligans vountarily rented their farm, moved from it to the city of Alliance, concluded all farming operations, sold all live stock and farm machinery and for three years voluntarily lived and resided in said city. There could not have been a more delib-

erate and definite conclusion of all farming operations or a more open and deliberate change in vocation.

"Enforced dispossession and termination of farming operations by legal proceedings does not effect a change in vocation."

In re Schermerhorn, 41 Fed. Supp. 447, on 449.

Williams v. Great Southern Life Ins. Co., 124 Fed. (2d) 38, on 40.

Noble v. Hopewell National Bank, 98 Fed. (2d) 623, on 626.

Layton v. Thayne, 133 Fed. (2d) 287, on 290.

The Circuit Court's assertion that debtor had lost title to his ranch is nothing more than an assumption as he claims ownership notwithstanding the Sheriff's Deed, which issue was never adjudicated because of his proceedings being dismissed.

II.

The Court was wholly without authority to dismiss the proceedings. Upon filing his petition with the Clerk of the District Court, Petitioner's status became that of an adjudicated bankrupt (Sec. 75n). On May 4, 1945, he filed his Amended Petition under Section 75s, asking to be adjudged a bankrupt (Tr. 22). As such adjudicated bankrupt, if not a farmer entitled to the benefits of Section 75, then he was entitled to the benefits of the General Bankruptcy Act. After he was denied such, his proceedings dismissed in the District Court, and appeal taken to the Circuit Court, he filed a Petition in the District Court asking that his estate be administered under Chapter XII of the Bankruptcy Act. The ownership of the ranch and many other issues remained unadjudicated. Both the District Court and on appeal the Circuit Court held they had no jurisdiction because of appeal pending from the ruling dismissing his proceedings because he was not a

farmer, which was the only issue adjudicated and involved in the appeal. The question of jurisdiction is always presentable to all Courts and at all times. Authorities certainly need not be cited in support of this kindergarten proposition. Petitioner cited *Wayne United Gas Company v. Owens-Illinois Glass Company*, 300 U. S. 131, 57 Sup. Ct. Rep. 382, in which this Court held that Bankruptcy Courts are Courts of equity, have no terms and can vacate their decrees so long as the case remains pending. Only by completely ignoring this cited decision could the Court say it was without jurisdiction. The case certainly remained pending.

MacKenzie v. Engelhard Co., 266 U. S. 131, 36 A. L. R. 416.

Brannon v. Commonwealth of Kentucky, 162 Ky. 350.

Union Joint Stock Land Bank v. Byerly, 310 U. S. 1, 60 Sup. Ct. Rep. 773 (dissenting opinion).

Kalb vs. Feuerstein, 308 U. S. 433, 60 Sup. Ct. Rep. 343.

In the MacKenzie case the Court states:

> "An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of * * * when the final judgment was reached it determined the rights of (the parties) ad initio * * *"

In the Brannon case the Court held:

> "Where a decree has not been overruled, where it is subject to modification upon Motion, or where the Court might grant a re-hearing or where an appeal might have been taken * * * the case could not be said to have reached that stage where it could be said it was not pending in that Court."

In the Union Joint Stock Land Bank case, the Court states:

"Until disposition of the farmer's petition, he was entitled to the protection and benefit of the Act, and the Bankruptcy Court had exclusive jurisdiction of his property."

In the Kalb case the Court states:

"Dismissal of the proceeding did not constitute its final disposition where reinstatements was available."

Since Petitioner's cause remained pending, the District Court had jurisdiction to set aside its erroneous dismissal and administer his estate under Chapter XII, as he petitioned it so to do, his status being that of an adjudicated bankrupt and all his property being in the jurisdiction of the Bankruptcy Court under the provision of the Bankruptcy Act. It was a flagrant violation of the law to dismiss these proceedings and deny him all relief under the Bankruptcy Act.

Section 75n.

Chapter XII, Chandler Act.

Federal Land Bank v. Nalder, 116 Fed. (2d) 1004.

Baxter v. Savings Bank, 92 Fed. (2d) 404.

Paradise Land and Live Stock Co. v. Federal Land Bank, 108 Fed. (2d) 832.

In the Nalder case the Court states:

"The debtor remains a bankrupt and her estate is to be administered and her debts discharged as in other case of voluntary bankruptcy."

In the Baxter case, supra, the Court states:

"The proper procedure after nullifying all procedure under subsection s of Sec. 75 would have been to adjudicate and refer under Section 22 of the Act." 11 U. S. C. A., Section 45.

In the Paradise case the Court states, "Debtor invoked the provision of subsection 's'; it asked to be alleged a bankrupt," and was therefore entitled to have "the administration of its estate as a bankrupt"; yet here the Court says it has no jurisdiction and Petitioner is entitled to no relief. Had the District Court adjudicated all various issues presented to it and appeal taken therefrom, then it would have been discretionary with the District Court to entertain any further proceedings, but when it ignored all such issues and erroneously dismissed the entire proceedings, surely on petition it not only had authority to then hear and adjudicate not only the issues previously unadjudicated but it was its duty so to do and it was erroneous not so to do when the law clearly required it so to do and to give Petitioner the benefit of the Bankruptcy Act.

SUMMARY

The record shows that Petitioner was born and reared in the vicinity of his ranch, that through long years of hard labor, frugality and denial he accumulated his ranch of about 10,000 acres and about 1,200 head of cattle thereon. In 1932 a serious financial and business depression occurred. In 1934, 1935 and 1936 unprecedented drought prevailed throughout the Northwest, including Petitioner's ranch. He began the purchase of feed to avoid the starvation of his cattle; continually the price of feed increased; the value of cattle decreased; soon the cattle were all sold and applied on his indebtedness drawing 12 per cent. His ranch was then mortgaged and title thereto now demanded. His Debtor's Petition alleges a total indebtedness against his ranch as of March 20, 1945, of $73,000.00 and alleges an equity therein of $50,000.00 (Tr. 2 and 4). As breeding cows are now conservatively of the value of

$150.00 a head, had he been given the benefit of Section 75 or Chapter XII, 500 head of cattle would now liquidate his entire indebtedness. The responsibility and advisability of Section 75 rested exclusively with Congress. It was the responsibility of Congress to determine its necessity. Here the record not only shows that Petitioner has at all times been denied the benefits of the Act but the record also shows that said denial was without legal or moral justification. In its decision the Circuit Court, in substance, has rewritten the Act and defeated Congress in the exercise of its constitutional rights and duty.

To the extent that the Courts justly administer the law is there an abiding public faith in them and respect for law, order and for the judiciary. The Constitution intends that when all other Courts have failed, then this Court shall afford judicial protection.

Petitioner most respectfully petitions this Court to grant his Petition and afford him the benefits of the law as by Congress intended.

Respectfully submitted,

MICHAEL P. JORDAN,
Petitioner.

By R. BROWN, Creston, Iowa,
Attorney for Petitioner.

M. L. DONOVAN,
1001 Omaha National Bank Bldg.,
Omaha, Nebraska,

G. P. NORTH,
Karbach Block,
Omaha, Nebraska,
Of Counsel.

In the
Supreme Court of the United States

OCTOBER TERM, 1945

No. 1007-1008

IN BANKRUPTCY

MICHAEL P. JORDAN,

Petitioner,

vs.

FEDERAL FARM MORTGAGE CORPORATION, et al,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDGAR M. MORSMAN, JR.,
520 Farnam Building, Omaha, Nebraska,

Attorney for Respondents, Stock Yards Natl. Bank, A. L. Johnson, John W. Drayton.

EDGAR M. MORSMAN, III,
MORSMAN & MAXWELL,
Omaha, Nebraska,

LYNN HETH,
Valentine, Nebraska,
of Counsel.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

CONTENTS

AUTHORITIES

In the
Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

IN BANKRUPTCY

MICHAEL P. JORDAN,

Petitioner,

vs.

FEDERAL FARM MORTGAGE CORPORATION, et al,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (Tr. pp. 8-12) is reported in 152 Fed. (2) 642. Opinions in a former attempted bank-

ruptcy by the same petitioner (but for which no writ of certiorari was ever sought) are found in 139 Fed. (2) 203, and in 48 Fed. Supp. 889.

ARGUMENT

It will appear at the outset that petitioner must be seeking two writs of certiorari, although petitioner (p. 7 of his petition) prays for only one writ directed to the Circuit Court of Appeals, Eighth Circuit "in the above entitled cause, being numbers 13,117 and 13,194," we shall consider the two matters separately.

Petition for Writ to Circuit Court of Appeals, Eighth Circuit—Docket No. 13,117

In this case petitioner has presumably filed with the court a certified transcript of the record, including the proceedings in the court to which the writ is asked to be directed, and petitioner has served upon at least the respondents, Stock Yards National Bank of South Omaha, A. L. Johnson and John W. Drayton, one copy of the printed record, by sending one copy to the attorney for those respondents.

Respondent cannot accept petitioner's statement of matters involved. A brief summary is as follows: Petitioner, a resident of Cherry County, Nebraska, whose 10,000-acre ranch was being foreclosed by respondent Stock Yards National Bank of South Omaha filed his debtor's petition in the District of Nebraska in 1942 as a farmer under Section 75 of the Bankruptcy Act. The

Conciliation Commissioner, the district court, and the Circuit Court of Appeals, Eighth Circuit, successively held that petitioner was not a farmer and dismissed the petition. See *In re Jordan,* 48 Fed. Supp. 889, and *Jordan v. Federal Land Bank of Omaha* (8th Circ.), 139 Fed. (2) 203.

Thereafter the foreclosure proceeded in the Nebraska state court with a sheriff's sale April 7, 1944, confirmation December 7, 1944, issuance of sheriff's deed January 3, 1945, and deed recorded January 4, 1945 (Tr. p. 18). This ended petitioner's interest in the Cherry County Nebraska ranch.

Thereafter petitioner entered into contracts for the purchase of three Iowa farms in the hope (as he states in his C. C. A. brief) that he might resell the same at a profit, and immediately rented them to tenants for the 1945 crop year. He owned no farm machinery nor equipment in Iowa. He never intended to take any part in the operation of the farms, nor did he ever visit the farms. (Opinion of Judge Riddick, 152 Fed. (2) 642; Tr. p. 10 of Circuit Court of Appeals proceedings.)

After losing all interest in his former land in Nebraska, petitioner again filed a debtor's petition in the Southern District of Iowa, Southern Division, on March 20, 1945, as a farmer under Section 75 of the Bankruptcy Act. This petition was dismissed by District Judge Dewey, which action was affirmed by the Circuit Court of Appeals (152 Fed. (2) 642).

This is not a proper case for writ of certiorari. The decision is in accord with the Supreme Court of the United States in *First Natl. Bank & Trust Co. v. Beach,*

301 U. S. 435. The decision does not differ from those of other circuits on the same matter, and the decision is in perfect harmony with *Shyvers v. Security-First Natl. Bank* (9th Cir.), 108 Fed. (2) 611, wherein this court denied certiorari in 309 U. S. 668, and with *Mulligan v. Federal Land Bank of Omaha* (8th Circ.), 129 Fed. (2) 438.

Contrary to statements in the petitioner's brief, the following matters are clear from the record:

1. The record is silent on the amount of interest on the mortgage. Petitioner's statement of 12% is irrelevant to be sure, but is also a misstatement of a fact outside the record.

2. In his brief, p. 10, petitioner states "he has applied all rentals on indebtedness against his ranch," but he does not refer to the record for authority, as he could find no support for such an erroneous statement.

3. The record, pp. 1 to 7 of Appellee's Supplement to Abstract of Record, shows conclusively that petitioner rented his ranch in 1942 for $4,000.00 cash, in 1943 for $4,000.00 cash, and in 1944 part of the ranch for $4,000.00 cash, with a claim by petitioner for additional rent for the balance. In no one of these three years was there any creditor pressing petitioner for which cause it could be said he leased the ranch. In 1941 he may have leased his ranch partly to secure money to pay an outside judgment creditor not involved in this action, but for the three subsequent years he had no occupation or employment and merely enjoyed his landlord receipts. Thus, this opinion is in accord with the opinion in the *Beach case* in this court, and with the *Shyvers case* of the 9th Circuit, from which

this court denied certiorari. These cases all deal with the "same matter," to wit, the definition of a farmer under Section 75-r of the Bankruptcy Act, and even petitioner does not point out in his brief any conflicting decisions of other circuits.

Petition for Writ to Circuit Court of Appeals, Eighth Circuit—Docket No. 13,194

As far as respondent knows there has not been filed a "certified transcript of the record including the proceedings in the court to which the writ is asked to be directed." The respondent has been served only with a printed "so-called transcript," which contains purportedly a motion for rehearing filed in the District Court for the Southern District of Iowa, Southern Division, a ruling on the motion, and a notice of appeal, all without any certificate of any clerk whatever. There is no mention anywhere of any proceedings in the Circuit Court of Appeals. The transcript for the other petition for writ (13,117 in the Circuit Court of Appeals) contains an opinion by Judge Riddick which is labeled "Nos. 13,117 and 13,194" and which seemingly deals with both appeals, but there is no other indication that there ever was an appeal to the Circuit Court of Appeals in No. 13,194, and there is no indication of what happened to the appeal in the Circuit Court of Appeals.

This alone should preclude the issuance of a writ of certiorari. However, even if a proper record and service were prepared, there is no suggestion of a ground for the issuance of a writ under Rule 38 (5) of this court. The "matter involved" is best explained by quoting from the opinion of Judge Riddick:

"Little need be said concerning the debtor's appeal from the order of the District Court denying his motion for a new trial. An order overruling a motion for a new trial is not appealable in the absence of a showing of an abuse of discretion on the part of the trial court. Not only is there no showing of an abuse of discretion upon the part of the trial court, but it also appears that the motion was not presented to the trial court until long after the appeal from the order dismissing appellant's petition under section 75 of the Bankruptcy Act had been taken and the appeal to this court perfected. The general rule is that after appeal from the District Court to the Circuit Court of Appeals has been perfected the District Court loses jurisdiction of the cause."

Respectfully submitted,

EDGAR M. MORSMAN, JR.,
520 Farnam Building, Omaha,
Nebraska,

Attorney for Respondents,
Stock Yards Natl. Bank,
A. L. Johnson,
John W. Drayton.

EDGAR M. MORSMAN, III,
MORSMAN & MAXWELL,
Omaha, Nebraska,

LYNN HETH,
Valentine, Nebraska,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1945

No. 1007-1008

In Bankruptcy

MICHAEL PHILLIP JORDAN,
Petitioner,

vs.

FEDERAL FARM MORTGAGE CORPORATION,
Et Al.,
Respondents.

PETITIONER'S REPLY BRIEF

M. L. DONOVAN,
Omaha National Bank Bldg.,
Omaha, Nebraska,

G. P. NORTH,
Karbach Block,
Omaha, Nebraska,

R. BROWN,
Creston, Iowa,
Counsel for Petitioner.

Law Briefs—OMAHA LINO-SLUG PRINTING CO—418 So. 15th St.

INDEX

TABLE OF CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

October Term, 1945

No.————

In Bankruptcy

MICHAEL PHILLIP JORDAN,
Petitioner,

vs.

FEDERAL FARM MORTGAGE CORPORATION,
Et Al.,
Respondents.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENTS

ARGUMENT

Respondents, preliminary to their argument, state that Petitioner "must be seeking two Writs of Certiorari, although Petitioner prays for only one Writ in the above entitled cause, being numbers 13117 and 13194," and then adds that same shall be considered separately. A reply to this and explanatory thereof will be discussed in Petitioner's argument of 13194, postea.

Reply to Respondents' Argument of 13117

In the first paragraph, Respondents state that Petitioner has presumably filed a certified Transcript of the Record and then states service on three Respondents, naming them, by service on attorneys for those Respondents. The office of the Clerk of this Court will show that there has been filed in his office a printed Transcript of the Record and will also show that service has been made on Wm. W. Graham and Edgar M. Morsman, III, whom the Clerk of the Circuit Court certifies appeared "for the Appellees" (pp. 5 and 6). Also on page 7 that Court in its Order states that those attorneys "for Appellees" argued the case upon submission.

In view of such a record those attorneys are not in a position to claim they did not and do not now represent all Respondents, or that service on them is not a sufficient service as to all Respondents.

Prior Adjudication, Loss of Title to Ranch and Rental of Ranch

On pages 2 to 5 the contention is made, first, that Petitioner has lost title to his ranch and that it has been previously so adjudicated; second, that he voluntarily rented the same and was no longer a farmer and has used the rental for his personal use, and cites three cases as so holding.

As to the first, Petitioner, in his Debtor's Petition, schedules the ranch as owned by him. His proceedings were dismissed because he was not a farmer.

There was no trial or adjudication as to his ownership. Therefore his petition stands as a verity as there

are many ways in which the sheriff's deed may be void or voidable, viz., if issued when bankruptcy proceedings were pending or otherwise illegally issued. But even though all ownership in the ranch was lost by the issuance of the sheriff's deed, still he has ownership in the ranch because of his right of redemption under the foreclosure of the two mortgages which he gave to the Federal Land Bank of Omaha. See "Supplement to Printed Abstract of Record," pages 1 to 3. That bank in its foreclosures is asking personal judgment against Petitioner as the maker of those loans. The right of redemption is property (*Wragg v. Federal Land Bank*, 317 U. S. 325, 63 Sup. Ct. Rep. 273). And the right of redemption before sale is an equitable right of redemption and after sale a statutory right of redemption. *Sayre v. Vander Voost*, 200 Ia. 990, on 993: "Whether exercised before sale or after, the right of redemption is essentially the same." "While the ownership continues the right of redemption continues." "When the ownership ceases the right of redemption ceases likewise of necessity." Therefore, it cannot be said that he has no title to his ranch because of the sheriff's deed, as he claimed ownership in his verified Debtor's Petition and there has been no trial or adjudication holding otherwise and, even if his title was so lost, yet he still has ownership by virtue of his right of redemption from the foreclosure of the mortgages by the Federal Land Bank. Since he filed his original Debtor's Petition in Nebraska, he has acquired three farms in Iowa, thus changing his financial status, whereby the former adjudication is not res judicata. "And a farmer shall be deemed a resident of any county in which such operations occur" (Sec. 75-r, Bankruptcy Act). As he owned three farms in Iowa, he surely had the right to file his Debtor's Petition in Iowa, and as the foreclosure of the mortgages

by the Federal Land Bank vested in him a new ownership, a property right of redemption, the Court was in error in its dismissal. In *Layton v. Thayne,* 144 Fed. (2d) 94, a second mortgage was foreclosed and execution issued, sale had and sheriff's deed issued. Subsequently, mortgagee began the foreclosure of the first mortgage. Held that debtor had a right of redemption and was entitled to have that right of redemption, which was property, administered under Sec. 75-r to s of the Bankruptcy Act.

As to the second voluntary rental of his ranch and use of rentals, the Petitioner was forced to lease his ranch to avoid loss of title through sheriff's sale (R. 12 and 13) and has annually leased for the following three years. The first year's rent was entirely taken by payment into court to satisfy judgment creditors (R. 13). Subsequent rental was used to pay taxes (R. 10), building fence, paint, setting out trees, purchase of windmills and many other expenses (R. 12 and 13). As his creditors were in a position to demand this rent, it is not probable that they allowed it to be diverted from the maintenance of the ranch. Enforced dispossession and termination of farming operations are discussed, and cases cited, in Brief in Support of Petition for Writ, and there is no necessity for repetition (Petition for Writ, p. 11). But if all that is claimed is conceded, yet if the case of *First National Bank, etc., v. Beach,* 301 U. S. 435, 57 Sup. Ct. Rep. 801, is to be regarded as the law, still Petitioner is a farmer. In that opinion this Court states, as to the definition of a farmer in Sec. 75-r: "The two are not equivalent. They are used by way of contrast." "The results will be the same, however, though the farming and the leasing be viewed as disconnected and not as parts of a composite whole.

In that view the farming is still the business; the leases are then investments more profitable than the business but leaving it unchanged. A farmer remains a farmer, just as a lawyer remains a lawyer, though the returns of his investments, while not enough to keep him going, are larger, none the less, than the profits of his labor." In substance, the facts here are a duplicate of the Beach case. Both debtors had for many years lived on and devoted all their time to operations on the land owned. Finally Beach leased nearly all his land, and here debtor was forced to lease all. Both continued to devote all their time to and on their real estate; Beach turned to gardening and poultry, and Petitioner to maintaining his 10,000-acre ranch by setting out trees, building fences, painting, buying windmills and many other ways. Neither turned to any other employment; both continued to have but one concern, to save their land. The two records are too similar to permit of distinction. If it is contended that Beach is a farmer because of his gardening, then Petitioner must still be a farmer because of his work on his land. As said in the Beach case, the leasing did not change the vocation. Respondents cite the Beach case and two others to sustain their contention, but fail to even attempt to set out their application or in what manner they offer any authority for the contention made here or to support the opinion of the Circuit Court. In *Shyvers v. Security First Natl. Bank,* 108 Fed. (2d) 611, cited, debtor had been for years a resident of London, England, and inherited a ranch of some 9,300 acres in California from her father, who died about the time of the World War. She filed her Petition in 1938. She had never been a farmer. Here there is no denial but that Petitioner was a farmer for years before he was compelled to lease his ranch to secure funds to avoid its loss by sheriff's sale. He persistently devoted

all his time to it after dispossessed, just as did Beach. His status was the same as that of Beach. Debtor Shyvers never was a farmer and never devoted any of her time to farming operations. Petitioner continued to be a farmer, just as Beach continued to be such. Shyvers never was more than a non-resident land owner. An analysis of the facts leaves a comparison as absurd. In the *Mulligan v. Federal Land Bank Case*, 129 Fed. (2d) 438, cited, debtor, in about May, 1937, leased her land and moved to Alliance, Nebraska, with her husband, where they resided for some three years, leasing their land during that time. On June 4, 1940, she filed a Debtor's Petition. In renting their farm and moving to Alliance they voluntarily determined to discontinue farming and, of necessity, could no longer claim to be such. It was an election on their part to terminate farming operations. Had they purchased and operated a drug store in Alliance they could no longer claim to be farmers. The facts would prove otherwise. But it would not be the operation of the drug store that changed their status. It would be their determination to conclude farming, and the operation of the store would be proof of that determination. The facts in the two cases preclude any claim of similarity. There may be a difference of opinions, but undisputed facts are a verity.

As to the Second Appeal

There were two appeals from the District to the Circuit Court involving the same parties and the same subject matter. The first, No. 13117, was an appeal from a judgment dismissing Debtor's Petition, deciding he was not a farmer. After such appeal was perfected, debtor filed in the District Court a Motion for Rehearing and Petition for Proceedings under Chapter XII of the Bankruptcy Act, which was denied by the District Court, and

appeal perfected to the Circuit Court. The two appeals were heard jointly and opinion so rendered. The opinion (see Clerk's Transcript, p. 9) recites:

> "After perfecting his appeal to this court from the order of the District Court dismissing his petition, the debtor filed in the District Court a pleading entitled 'Motion for Re-Hearing and Petition for Proceedings under Chapter XII of the Bankruptcy Act.' The District Court dismissed this pleading on the ground that it came too late, and the debtor appealed from this order of dismissal. Both appeals were consolidated for hearing in this court."

and concludes with the following:

> "The judgment of the District Court dismissing the debtor's petition under Section 75 of the Bankruptcy Act in No. 13,117 is affirmed. The appeal from the order of the District Court denying the debtor's motion for a new trial in No. 13,194 is dismissed."

In the first appeal, No. 13117 (Tr. 36), Statement of Point III, it is alleged that the Court "committed error in dismissing said petition and not administering his estate in bankruptcy as provided in Sec. 75-s or Chapter XII of the Chandler Act." Therefore, in the first appeal debtor was demanding that his estate in bankruptcy be administered under Chapter XII of the Chandler Act if he were not entitled to benefits of Section 75-s; the filing of the Motion for Rehearing in the District Court and Petition for Proceedings under Chapter XII of the Bankruptcy Act was only filed for the purpose of giving the District Court an opportunity to correct its own error and present that issue more prominently in the Circuit Court. Also, since Petitioner's status under Sec. 75-n is that of an adjudicated bankrupt and since he had filed his Amended Petition asking to be adjudged a bankrupt under Sec.

75-s (Tr. 22), he had the right under the Bankruptcy Act to have his estate administered under some chapter of that Act. The Court had no authority in law to deny him such. Having become an adjudicated bankrupt, it became the duty of the Court to administer his estate in bankruptcy and no Motion or Petition, such as the opinion and the record shows he filed, were necessary. The second appeal presented nothing new for the Circuit Court to decide. Petitioner was asking in his first appeal, No. 13117, the benefits of Chapter XII if not entitled to the benefits of Sec. 75 a-s, and was only repeating and emphasizing such in his second appeal, No. 13194. This being true, nothing could be gained by filing in this Court a printed Transcript of the Record and docketing two appeals in this Court, as the issue to the benefits to Chapter XII was clearly involved in the first appeal and that is all and the only issue involved in the second appeal. Petitioner is informed that the Clerk of the Circuit Court has filed with the Clerk of this Court a typewritten transcript in the second appeal, which includes an order of the Circuit Court dated November 6, 1945, in which the motion of appellant to merge the two cases "is hereby granted and this appeal will be considered as submitted to the court for determination with case No. 13117." Also, it contains a judgment entry dated December 27, 1945, in said cause No. 13194, in which it is ordered and adjudged that said appeal "is hereby dismissed," but no reference is needed to said typewritten transcript in No. 13194 to ascertain that nothing more was involved therein than the demand of Petitioner that his estate be administered under Chapter XII of the Bankruptcy Act if he were not entitled as a farmer to the benefits of Sec. 75 r-s.

CONCLUSION

In conclusion, Petitioner contends that the record here discloses a long and persistent struggle on his part to save his ranch, the loss of which will leave him penniless. That he never devoted himself to any other activity or vocation after reaching his majority than the enlargement of his ranch, he now being nearly 70 years of age. The only contention made and which could possibly be made was that he changed his vocation in renting his ranch, when the record shows that he rented it to avoid the sheriff's sale and deed and that all rental then received was paid into court, whereby said loss was avoided. That he has never engaged in any other activity since but has devoted all his time to the care, preservation and saving of his ranch. That he has been judicially denied that which Congress enacted for the benefit of all so situated. As to him, said Act has been judicially repealed.

Respectfully submitted,

MICHAEL P. JORDAN,
Petitioner.

By R. BROWN, Creston, Iowa,
Attorney for Petitioner.

M. L. DONOVAN,
1001 Omaha National Bank Building,
Omaha, Nebraska,

G. P. NORTH,
Karbach Block,
Omaha, Nebraska,
Of Counsel.